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No. 578

In the Supreme Court of the United States

OCTOBER TERM, 1957

CORNELI JOEL GROSSMAN, APPELLANT

v.

UNITED STATES OF AMERICA, UNITED STATES ATOMIC ENERGY COMMISSION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION TO DISMISS

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

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UNITED STATES OF AMERICA, UNITED STATES ATOMIC ENERGY COMMISSION

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MOTION TO DISMISS

Appellees in the above-entitled case move to dismiss the appeal pursuant to Rule 14(2) of the Revised Rules of this Court for the reason that appellant has failed to docket within the time allowed by Rule 13(1), or, in the alternative, to dismiss pursuant to Rule 16(1)(a) of the Revised Rules for the reason that review is not sought in conformity to statute.

1. In this action, appellant claims compensation under Section 11(e), Atomic Energy Act of 1946, 60 Stat. 769, 42 U.S.C. (1946 ed.) 1811(e), now Sections 157 and 189, Atomic Energy Act of 1954, 68 Stat. 947, 955, 42 U.S.C. (Supp. II, 1955), 2187, 2239, for his alleged invention of the formula for the atomic bomb. His claim was denied by the Atomic Energy Commis-

sion after hearing by the Commission's Patent Compensation Board. The Commission's determination was affirmed by the United States Court of Appeals for the District of Columbia Circuit in a *per curiam* opinion dated June 13, 1957 (Juris. St. 1a-2a). 246 F. 2d 709. On July 1, 1957, appellant filed in the United States Court of Appeals for the District of Columbia Circuit a notice of appeal to this Court. This appeal was not docketed in this Court by appellant until October 25, 1957, one hundred and sixteen days after the notice of appeal was filed. No enlargement of time was obtained. Accordingly, appellant failed to comply with Rule 13 of the Revised Rules in that he did not docket the case within "sixty days after the filing of the notice of appeal." Appellees therefore move that this Court dismiss his appeal pursuant to Rule 14(2).[1]

2. The statute under which appellant invokes this Court's jurisdiction of his appeal provides specifically for review by writ of certiorari and not by appeal. Section 11(e)(4), Atomic Energy Act of 1946, 60 Stat.

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[1] An earlier motion to dismiss was filed by appellees in the court below on the mistaken assumption that that court, rather than this Court, was then "possessed of the record" within the intendment of Rule 14(2). On October 16, 1957, appellant filed in the court below a reply to that motion together with an "Application to the Supreme Court of the United States for an Extension of Time to Docket This Case." But the court of appeals had no power to entertain or grant this application since it was presented after "the expiration of the original sixty-day period" prescribed by Rule 13(1). Instead, on October 25, 1957, the court of appeals ordered "that appellant's appeal to the Supreme Court of the United States be, and it is hereby, dismissed, unless petitioner shall show this Court within fifteen days that he has complied with Rule 13 of the Supreme Court of the United States." Since the court of appeals at that time was not "possessed of the record" within the intendment of Rule 14(2), this order of dismissal would appear to be beyond that court's jurisdiction. For that reason we are filing the present motion to dismiss in this Court.

770, 42 U.S.C. (1946 ed.) 1811(e)(4), as amended, Section 189, Atomic Energy Act of 1954, 68 Stat. 955, 42 U.S.C. (Supp. II, 1955) 2239. The appeal taken by appellant cannot be treated as a petition for writ of certiorari, inasmuch as 28 U.S.C. 2103 is expressly limited to appeals taken from state courts and does not extend to the present appeal sought to be taken from a United States Court of Appeals. See *Bradford Electric Co.* v. *Clapper*, 284 U.S. 221, 223-225;[2] Wolfson and Kurland, *Jurisdiction of the Supreme Court of the United States*, § 122 (1951). Accordingly, if this Court does not dismiss this appeal under Rule 14(2), for the reason stated above, then we respectfully submit that it should be dismissed under Rule 16(1)(a) on the ground that appeal does not lie to review the decision below.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

NOVEMBER, 1957.

[2] Sections 240 and 237(c) of the Judicial Code, discussed in that case, are now replaced by the provisions in 28 U.S.C. 1254 and 28 U.S.C. 2103, respectively.

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